APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 20706

EXECUTIVE JET AVIATION, INC., ET AL., *Plaintiffs-Appellants,*

v.

CITY OF CLEVELAND, OHIO, ET AL., *Defendants-Appellees.*

APPEAL from the United States District Court for the Northern District of Ohio, Eastern Division.

Decided and Filed August 24, 1971.

Before PHILLIPS, Chief Judge, and EDWARDS and MCCREE, Circuit Judges.

PHILLIPS, Chief Judge. This appeal grows out of one-plane aircraft accident. The suit was filed in admiralty. The sole issue on appeal is whether the action is within the admiralty jurisdiction of the District Court. We hold that the alleged tort occurred on land, even though the plane fell into navigable waters shortly after take off from the airport, and that no right of action is cognizable in admiralty. We affirm the judgment of District Judge Girard E. Kalbfleisch, who dismissed the complaint.

The facts, as set forth in the complaint and supplemented by interrogatories and depositions, are as follows:

On July 28, 1968, a Falcon Mystere jet aircraft, owned by appellant Executive Jet Sales, Inc., and operated by appellant Executive Jet Aviation, Inc., struck hundreds of sea gulls seconds after take off from Burke Lakefront Airport in Cleveland, Ohio. The sea gulls were flushed from the

airport runway by the aircraft as it became airborne and collided with the plane over the airport runway. The plane immediately suffered a substantial loss of power and began to descend while still over land. It struck the airport perimeter fence, then hit a pick-up truck, and finally settled a short distance off shore into the navigable waters of Lake Erie.

No persons were killed or injured, but the aircraft was alleged to be a total loss as a result of the soaking in the waters of Lake Erie.

The appellees are the City of Cleveland, owner of the airport; Phillip A. Schwenz, the airport manager on the date in question; and Howard E. Dicken, the air traffic controller on duty at the time in question.

The complaint alleged that the loss of the aircraft was a result of the appellees' negligence in clearing the aircraft for take off, failing to warn appellants of the huge flock of sea gulls on the runway, and failing to remove the sea gulls from the runway.

The Supreme Court said in *The Admiral Peoples,* 295 U.S. 649, 651:

> "This is one of the border cases involving the close distinctions which from time to time are necessary in applying the principles governing the admiralty jurisdiction. That jurisdiction in cases of tort depends upon the locality of the injury. It does not extend to injuries caused . . . to persons or property on the land. Where the cause of action arises upon the land, the state law is applicable. *The Plymouth,* 3 Wall. 20, 33; *Johnson* v. *Chicago & Pacific Elevator Co.,* 119 U.S. 388, 397; *Cleveland Terminal & V. R. Co.* v. *Cleveland Steamship Co.,* 208 U.S. 316, 319; *Atlantic Transport Co.* v. *Imbrovek,* 234 U.S. 52, 59; *State Industrial Comm'n* v. *Nordenholt Corp.,* 259 U.S. 263, 272; *Smith*

& Son v. *Taylor,* 276 U.S. 179, 181; compare *Vancouver S. S. Co.* v. *Rice,* 288 U.S. 445, 448."

The dispositive issue is whether the cause of action for the alleged tort arose on land or on navigable water.

The test to determine whether a cause of action in tort arose on land or on navigable water was applied by decisions of the Supreme Court in *The Admiral Peoples, supra,* and *Minnie* v. *Port Huron Co.,* 295 U.S. 647. We consider these opinions, written by Chief Justice Hughes for a unanimous Court, to control the present case.

In *The Admiral Peoples, supra,* a lady passenger fell from the ship's gangplank onto the wharf where she was injured.[1] The passenger alleged that the fall was caused by negligent placement or construction of the ship's gangplank. The Supreme Court said:

"By reason of that neglect, as the libel alleges, she fell from the plank and was violently thrown forward upon the dock. Neither the short distance that she fell nor the fact that she fell on the dock and not in the water, alters the nature of the cause of action which arose from the breach of duty owing to her while she was still on the ship and using its facility for disembarking.

"This view is supported by the weight of authority in the federal courts. In *The Strabo,* 90 Fed. 110, 98 Fed. 998, libelant, who was working on a vessel lying at a dock, attempted to leave the vessel by means of a ladder which, by reason of the master's negligence, was not secured properly to the ship's rail and in consequence the ladder fell and the libelant was thrown to the dock and injured. The District Court, sustaining the admiralty jurisdiction, asked these pertinent ques-

[1] A wharf is an extension of land and not within the jurisdiction of admiralty. *Rodrique* v. *Aetna Casualty Co.,* 395 U.S. 352, 360.

tions (90 Fed. p. 113): 'If a passenger, standing at the gangway, for the purpose of alighting, were disturbed by some negligent act of the master, would the jurisdiction of this court depend upon the fact whether he fell on the dock, and remained there, or whether he was precipitated upon the dock in the first instance, or finally landed there after first falling on some part of the ship? If a seaman, by the master's neglect, should fall overboard, would this court entertain jurisdiction if the seaman fell in the water, and decline jurisdiction if he fell on the dock or other land? The inception of a clause of action is not usually defined by such a rule.' The Circuit Court of Appeals of the Second Circuit, affirming the decision of the District Court (98 Fed. p. 1000), . . . said: 'The cause of action originated and the injury had commenced on the ship, the consummation somewhere being inevitable. It is not of vital importance to the admiralty jurisdiction whether the injury culminated on the stringpiece of the wharf or in the water.' See, also, *The Atna,* 297 Fed. 673, 675, 676; *The Brand,* 29 F. (2d) 792." *Id.* at 652-53.

The Court held in *The Admiral Peoples* that the passenger's cause of action arose on navigable water.

The Supreme Court reached the same conclusion in *Minnie* v. *Port Huron Co., supra,* 647-49:

"Petitioner, a longshoreman, was injured at Port Huron while unloading a vessel lying in navigable water. He was about his work on the deck of the vessel when he was struck by a swinging hoist, lifting cargo from a hatch, and was precipitated upon the wharf. He sought compensation under the compensation act of the State of Michigan. His employer, the Port Huron Terminal Company, contended that the accident occurred upon navigable water and that the state law did not apply. The defense was overruled

by the state commission in the view that the injury must have been occasioned by petitioner's fall upon the wharf and hence that the claim was within the state statute, although the injury would not have been received except for the force applied to his person while on the vessel. The Supreme Court of the State vacated the commission's award, holding that the federal law controlled. 269 Mich. 295; 257 N. W. 831. Because of an asserted conflict with decisions of this Court, a writ of certiorari was granted.

". . . In the instant case, the injury was due to the blow which petitioner received from the swinging crane. It was that blow received on the vessel in navigable water which gave rise to the cause of action, and the maritime character of that cause of action is not altered by the fact that the petitioner was thrown from the vessel to the land.

"We had the converse case before us in *Smith & Son* v. *Taylor*, 276 U.S. 179. There a longshoreman, employed in the unloading of a vessel at a dock, was standing upon a stage that rested solely upon the wharf and projected a few feet over the water to or near the vessel. He was struck by a sling loaded with cargo, which was being lowered over the vessel's side and was knocked into the water, where sometime later he was found dead. It was urged that the suit was solely for the death which occurred in the water and hence that the case was exclusively within the admiralty jurisdiction. We held the argument to be untenable. We said: 'The blow by the sling was what gave rise to the cause of action. It was given and took effect while deceased was upon the land. It was the sole, immediate and proximate cause of his death. *The G. R. Booth*, 171 U.S. 450, 460. The substance and consummation of the occurrence which gave rise to the cause of action took place on land.' *Id.*, p. 182."

In the present case the aircraft was precipitated into Lake Erie by the allegedly negligent acts of the appellees on land. The aircraft collided with the sea gulls and began to fall while over land. The fence and the truck were struck on land. Under the authorities cited above it is of no consequence that the major amount of damage occurred after the aircraft sank in navigable water. The alleged negligence of appellees "was given and took effect" on land. *Smith & Son* v. *Taylor*, 276 U.S. 179, 182. The cause of action arose on land and not on navigable water.

Appellants rely heavily on *Weinstein* v. *Eastern Airlines, Inc.*, 316 F.2d 758 (3rd Cir.). As we read that decision, the test for admiralty jurisdiction over torts stated at 316 F.2d at 761 produces the same result we have reached when applied to the facts of the present case. The Court said:

> "The critical factor in determining whether a tort claim comes within the broad statutory grant of admiralty jurisdiction is the situs of the tort; i. e., the place where it happened." *Id.* at 761.

Since we agree with the District Court that the alleged tort in this case occurred on land before the aircraft reached Lake Erie, and since admiralty jurisdiction does not extend to torts committed on land, it is not necessary to consider the question of maritime relationship or nexus discussed by this court in *Gowdy* v. *U. S.*, 412 F.2d 525, 527-29 (6th Cir.), *cert. denied*, 396 U.S. 960, and *Chapman* v. *City of Gross Pointe Farms*, 385 F.2d 962, 966 (6th Cir.). *See Nacirema* v. *Johnson*, 396 U.S. 212, 215, n. 7; *Atlantic Transport Co.* v. *Imbrovek*, 234 U.S. 52, 58-60; *Wiper* v. *Great Lakes Engineering Works*, 340 F.2d 727, 729-31 (6th Cir.).

Affirmed.

McCree, Circuit Judge (concurring in the opinion of Judge Phillips). I wish to add a few words of concurrence to Chief Judge Phillips' opinion. Our court adopted the "locality-plus" test of maritime jurisdiction in *Chapman* v. *City of Grosse Pointe Farms,* 385 F.2d 962 (6th Cir. 1967), and *Wiper* v. *Great Lakes Engineering Works,* 340 F.2d 727 (6th Cir. 1965), *cert. denied,* 382 U.S. 812 (1965), but I agree with Judge Phillips that the difference between that test and the "locality-alone" test is not involved in the decision of this case. The crucial question here—on which I read Judge Phillips and Judge Edwards to take opposite views—is where did the tort occur?

That question I believe is foreclosed by the cases cited by Judge Phillips, at 4-5 (draft opinion), and Judge Edwards, at 9-10 (draft opinion), and by *Wiper.* The rule, as I understand it, is that the situs of the tort is where the negligence becomes operative, not where the damages, or the major portion of them, are sustained. Applied here, this rule requires affirmance of Judge Kalbfleisch's careful opinion. The plane hit the gulls over land; and there, under our rule, is where the tort occurred. Maritime jurisdiction is absent, and it becomes unnecessary to decide whether there is (or must be) a "plus", because there is no maritime "locality".

I do not read the Third Circuit's opinion in *Weinstein* v. *Eastern Airlines, Inc.,* 316 F.2d 758 (3d Cir. 1963), as necessarily contradicting this view. Neither in that court's opinion, nor in the opinion of the District Court whose judgment it was reviewing, 203 F.Supp. 430 (E.D. Pa. 1962), is there a finding where the impact of the tortious conduct was first evidenced—over land or over sea. However, it is clear that the plane was airborne, and, at the posture of review required by the motion to dismiss, the

inference most favorable to plaintiff would be that the negligence became operative over water. Nevertheless, that court held that the situs of the tort was where the injury was sustained, 316 F.2d at 765, and on the facts presented, it was clear that that was within navigable waters. We have a different rule, and I believe we could not reach that result without overruling *Wiper*, not to mention the Supreme Court cases cited by Judge Phillips.

In *Weinstein*, the Third Circuit stated in dictum that airplanes, at least over navigable waters, were to be considered prima facie maritime. 316 F.2d at 7. I agree, as a matter of policy, with much of what Judge Edwards has written in support of the view that "air ships . . . are within the maritime jurisdiction when they crash on navigable waters." At 5 (draft opinion). But I have not seen cited a statute indicating that Congress has so extended maritime jurisdiction. Arguably it might be able to do so, and should, but it is the job of Congress, and not of the courts, to broaden maritime jurisdiction to cover the facts of this case. Under established law, we are faced only with a narrower question, which can be answered fairly readily unless we wish to depart from the precedents which normally bind us.

EDWARDS, Circuit Judge, dissenting. This case presents a single important question:

Do the federal courts have maritime jurisdiction over airplane crashes in navigable waters where the cause of the crash is alleged to be tortious conduct which occurred on land?

The Third Circuit has previously answered this question affirmatively in the context of death cases arising out of the crash of a passenger aircraft into Boston Harbor shortly after takeoff where the causes of the crash were alleged, as here, to have been land-based. *Weinstein* v.

Eastern Airlines, Inc., 316 F.2d 758 (3d Cir.), *cert. denied*, 375 U.S. 940 (1963).[1]

In our instant case, the facts properly before the court on motion for summary judgment showed that an aircraft taking off from a lakefront airport in Cleveland, Ohio, struck a flight of sea gulls, ingesting sufficient of them into its jet system to cause loss of power while it was still over the runway and that the plane subsequently grazed a truck and the airport perimeter fence before being destroyed by crashing into and sinking in the navigable waters of Lake Erie two-fifths of a mile from shore. Appellants allege that the crash was caused by failure of defendants to warn the pilot of the aircraft of the presence of "a sea of birds" on the runway, which fact was known to defendants or their agents but not to the pilot because of the topography of the runway.

The crew of the aircraft survived and the pilots by deposition provided the District Court with this vivid and undisputed summary of the crash.

> "After clearance to take-off was received the pilot in the left seat executed the take-off and rotated at approximately 125 Kts. The pilot in the right seat made a power check, voiced 30 Kts., 100 Kts., V_1 and rotate. The pilot in the left seat could not distinguish the bird line prior to rotation and in his estimation could not abort the take-off. On rotating a sea of

[1] *Weinstein* has subsequently been reaffirmed by the Third Circuit in *Scott* v. *Eastern Airlines, Inc.*, 399 F.2d 14 (3d Cir.), *cert. denied*, 393 U.S. 979 (1968), and has been cited and followed by a number of District Courts: *Hornsby* v. *Fishmeal Co.*, 285 F.Supp. 990, 993 (W.D. La. 1968), *rev'd on other grounds*, 431 F.2d 865 (5th Cir. 1970); *Rapp* v. *Eastern Airlines, Inc.*, 264 F.Supp. 673 (E.D.Pa. 1967) (*aff'd by Scott, supra*); *Horton* v. *J & J Aircraft, Inc.*, 257 F.Supp. 120 (S.D.Fla. 1966); *Montgomery* v. *Goodyear Tire & Rubber Co.*, 231 F.Supp. 447, 453 (S.D.N.Y. 1964), *aff'd*, 392 F.2d 777 (2d Cir. 1968); *Harris* v. *United Airlines*, 275 F.Supp. 431 (S.D.Iowa 1967).

> birds on the runway became visible. Approaching the birds at approximately 75 feet caused them to flush and fly into the aircraft * * *. Bird impact substantially reduced the air speed an estimated 15 or 20 Kts. The pilot in the left seat raised the gear handle, the pilot in the right seat maneuvered the throttles in an effort to obtain partial power. There was almost immediate total loss of power. The engine temperature indicated above 850 degrees on both engines and the RPM dropped rapidly below 70%. The aircraft flew in a semi-stalled attitude stall horn blowing until contacting the water. The aircraft struck the top of a pick-up truck and a portion of the airport perimeter fence. The aircraft contacted the water in a flat attitude and on a second impact water entered the cabin almost immediately. Only a few seconds passed between bird impact and water contact and it is estimated that the aircraft did not attain more than 75 to 100 feet in altitude."

In a well-reasoned opinion which sought earnestly to follow the logic of this court's previous opinions dealing with maritime jurisdiction (in cases where the facts differed greatly from the present ones), the District Judge granted defendant-appellees' motions for summary judgment. Relying primarily upon this Court's opinions in *Chapman* v. *City of Grosse Pointe Farms,* 385 F.2d 962 (6th Cir. 1967), and *Wiper* v. *Great Lakes Engineering Works,* 340 F.2d 727 (6th Cir.), *cert. denied,* 382 U.S. 812 (1965), the District Judge reasoned:

> "[I]n this case the airport and the runway were upon land and the alleged negligence which caused the plane to crash occurred upon land. Further, the plane became disabled over land and came into contact with a fence and a truck before ever crossing the shoreline. It is this Court's opinion that the eventual crash of the plane into Lake Erie, and its destruction

by water, are at best fortuitous and are significant 'not to determine the maritime or non-maritime nature of this action but only as it relates to damages.' (*Wiper*, supra.)

"It is the opinion of the Court, therefore, that the tort in this case did not occur upon navigable waters and the action is not cognizable in admiralty. In reaching this conclusion, the Court is well aware of the many decisions holding that a plane crash into navigable waters is within admiralty jurisdiction. However, as the analysis above reveals, drawing from those cases a general rule that all plane crashes into navigable waters are cognizable in admiralty and applying such a rule here would belie the principles which governed locality of the tort before the problems peculiar to air commerce arose. Where the facts are not known, a court might righly assume that the alleged negligence became operative and effective upon the aircraft over navigable waters; but here the alleged negligence had crippled the plane well before it reached the water. Assuming otherwise would require that the Court ignore the very facts upon which it must rely in testing jurisdiction. Without distinguishing each of the cases involving an airplane crash into navigable waters, it is sufficient to state that the undisputed facts in this case demonstrate that the tort occurred over the land."

While I respect the logic and industry with which the District Judge approached his task, I would reach a different result. There are legal and policy questions of great portent for the future which this case requires us to answer. I believe that the facts of this case require us to accept or reject *Weinstein, supra,* and thus, to decide for this Circuit whether air ships, which are increasingly displacing water-borne ships in maritime commerce, are within the maritime jurisdiction when they crash on navigable waters.

Admiralty Jurisdiction in the United States

Article III, § 2 of the Constitution of the United States provides:

> "The judicial Power shall extend . . . to all Cases of admiralty and maritime Jurisdiction; . . ."

By statute Congress has vested "original jurisdiction of . . . [a]ny civil case of admiralty or maritime jurisdiction . . ." in the district courts. 28 U.S.C. § 1333 (1964).

The United States Supreme Court decided over a hundred years ago that admiralty jurisdiction extended to all navigable waters (as opposed to the original tidewater or high seas concepts). This, of course, included the Great Lakes into one of which (Lake Erie) the plaintiffs' plane crashed. *The Propeller, Genesee Chief, et al.*, 53 U.S. (12 How.) 443 (1851).

Congressional Recognition of Admiralty Jurisdiction Over Aircraft

In various ways Congress has recognized maritime jurisdiction over aircraft flying over, resting upon, or crashing into navigable waters.

(a) In 1953 Congress adopted a statute which employed maritime jurisdiction to make a variety of federal criminal laws applicable to aircraft (owned by the United States or by United States citizens) "while such aircraft is in flight over the high seas, or over any other waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular state." 18 U.S.C. § 7(5).

(b) In 1920 Congress adopted the Death on the High Seas Act providing a remedy in the District Court in admiralty to the personal representatives of persons wrongfully killed on the high seas beyond a marine league from shore.

This statute has been unanimously interpreted as applicable to deaths resulting from airplane crashes as well as to deaths on ships on the high seas. *Wilson* v. *Transocean Airlines*, 121 F.Supp. 85 (N.D.Cal. 1954); *Guess* v. *Read*, 290 F.2d 622 (5th Cir. 1961), *cert. denied*, 368 U.S. 957 (1962) (Black, J., dissenting); *Noel* v. *Airponents, Inc.*, 169 F.Supp. 348 (D.N.J. 1958); *Stiles* v. *National Airlines, Inc.*, 161 F.Supp. 125 (E.D. La. 1958), *aff'd*, 268 F.2d 400 (5th Cir.), *cert. denied*, 361 U.S. 885 (1959); *Noel* v. *United Aircraft Corp.*, 219 F.Supp. 556 (D.Del. 1963), *aff'd in part, rev'd in part*, 342 F.2d 232 (3d Cir. 1965); *Bergeron* v. *Aero Associates, Inc.*, 213 F.Supp. 936 (E.D.La. 1963); *Wyman* v. *Pan American Airways, Inc.*, 45 N.Y.S.2d 420 (1943), *aff'd*, 48 N.Y.S.2d 458 (S.Ct.App.Div.), *leave denied*, 49 N.Y.S.2d 271, *cert. denied*, 324 U.S. 882 (1944); *Lacey* v. *L. W. Wiggins Airways, Inc.*, 95 F.Supp. 916 (D.Mass. 1951).[2]

The emphasis of Congress upon the navigable waters test of its jurisdiction is clearly shown in the Admiralty Extension Act of 1948.

> "*Extension of admiralty and maritime jurisdiction; libel in rem or in personam; exclusive remedy; waiting period*
>
> The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land." 46 U.S.C. § 740 (1964).

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[2] *See also Moragne* v. *States Marine Lines, Inc.*, 398 U.S. 375 (1970), overruling *The Harrisburg*, 119 U.S. 199 (1886), recognizing a remedy for wrongful death under general maritime law, and allowing application of the Death on the High Seas Act to similar death cases in territorial waters.

SUPREME COURT CASES ON MARITIME JURISDICTION

It is clear that the judicial power of the United States has the task of defining the limits of admiralty jurisdiction within the general language and history of the constitutional grant. *The Propeller, Genesee Chief, et al., supra; The Steamer St. Lawrence,* 66 U.S. 522 (1861); *Detroit Trust Co.* v. *The Thomas Barlum,* 293 U.S. 21 (1934). But it is equally clear that defining those limits has been and is anything but simple.

In property law, the line where the sea at high tide meets the shore is called "the meander line". The term might well be used to apply to the perimeter of admiralty jurisdiction—at least as applied to tort actions wherein the tort, as here, involves incidents on both land and navigable waters. *See generally, The Plymouth,* 70 U.S. (3 Wall.) 20 (1865); *London Guaranty & Accident Co. Ltd.* v. *Industrial Accident Comm'n,* 279 U.S. 109 (1929); *Atlantic Transport Co.* v. *Imbrovek,* 234 U.S. 52 (1914); *Minnie* v. *Port Huron Co.,* 295 U.S. 647 (1935), and *T. Smith & Sons, Inc.* v. *Taylor,* 276 U.S. 179 (1928). The Supreme Court has not as yet decided any case dealing with admiralty jurisdiction over airplane crashes. But in the series of sea-land cases[3] cited above it has decided cases where, for varying reasons, varying jurisdictional results were reached.

In *The Plymouth, supra,* the Supreme Court held that sea-based negligence of a docked steamer's crew which set fire to and burned down dock-side warehouses did not give rise to admiralty jurisdiction. The case can be and has been argued by appellants for the proposition that "locality alone" controls (referring to locality of the damage) and by appellees that it is the locality where the negligence takes effect that counts.

In *The Admiral Peoples,* 295 U.S. 649 (1935), a ship's passenger fell from a ship's gangplank (alleged to have

[3] We here employ "sea" in the sense of navigable waters.

been negligently placed or constructed) to a dock where she was injured. The Court noted that the breach of duty occurred on shipboard and upheld admiralty jurisdiction.

In *Minnie* v. *Port Huron Co., supra,* a similar result was reached where a longshoreman on the deck of a vessel was struck by a swinging hoist and knocked onto a dock. The Court there noted that "the injury was due to the blow." *Id.* at 182. It cited and relied upon *T. Smith & Sons, Inc.* v. *Taylor, supra,* which reached an opposite result where the sling was land-based and knocked the longshoreman into the water. The Court's final rationale concerning *T. Smith & Sons, Inc.* v. *Taylor* was, "The substance and consummation of the occurrence which gave rise to the cause of action took place on land." 276 U.S. at 182.

I make no suggestion that there is a simple consistency to be found in the reasoning of all these cases.

Harsh facts frequently appear to have affected results. The *Smith & Sons* case, for example, preceded the effective date of the federal Longshoremen's Compensation Act and upheld a state compensation award. The holding of the court was to deny that "the case is *exclusively* within admiralty jurisdiction" as appellants therein were claiming. *T. Smith & Sons, Inc.* v. *Taylor,* 276 U.S. 179, 182 (1928) (emphasis added). And as we have noted above, Congress, in passing the Admiralty Extension Act of 1948, acted to extend admiralty jurisdiction so as to eliminate the holding of *The Plymouth, supra.*

Among the older cases, we find the most careful approach and reasoning in the *Imbrovek* case where Chief Justice Hughes said:

> "The principal question is whether the District Court had jurisdiction; that is, whether the cause was one 'of admiralty and maritime jurisdiction.' Const. Art. III, § 2; Rev. Stat., § 563; Judicial Code, § 24; Act of Sept. 24, 1789, c. XX, § 9, 1 Stat. 73, 76. As the

injury occurred on board a ship while it was lying in navigable waters, there is no doubt that the requirement as to locality was fully met. The petitioner insists, however, that locality is not the sole test, and that it must appear that the tort was otherwise of a maritime nature. And this was the view taken by the Circuit Court of Appeals for the Ninth Circuit, in affirming a decree dismissing a libel for want of jurisdiction in a similar case. *Campbell* v. *Hackfeld & Co.*, 125 Fed. Rep. 696.

"At an early period the court of admiralty in England exercised jurisdiction 'over torts, injuries, and offences, in ports within the ebb and flow of the tide, on the British seas and on the high seas.' *De Lovio* v. *Boit*, 2 Gall. 398, 406, 464, 474. While its authority was denied when the injurious action took place *infra corpus comitatus*, it was not disputed that jurisdiction existed when the wrong was done 'upon the sea, or any part thereof which is not within any county.' (4 Inst. 134.) The jurisdiction in admiralty of the courts of the United States is not controlled by the restrictive statutes and judicial prohibitions of England (*Waring* v. *Clarke*, 5 How. 441, 457, 458; *Insurance Company* v. *Dunham*, 11 Wall. 1, 24; *The Lottawanna*, 21 Wall. 558, 576); and the limitation with respect to torts committed within the body of any county is not applicable here. *Waring* v. *Clarke*, *supra*; *The Magnolia*, 20 How. 296. 'In regard to torts'—said Mr. Justice Story in *Thomas* v. *Lane*, 2 Sumn. 1, 9—'I have always understood, that the jurisdiction of the Admiralty is exclusively dependent upon the locality of the act. The Admiralty has not, and never (I believe) deliberately claimed to have any jurisdiction over torts, except such as are maritime torts, that is, such as are committed on the high seas, or on waters within the ebb and flow of the tide.' This rule—that locality furnishes the test—has been fre-

quently reiterated, with the substitution (under the doctrine of *The Genesee Chief,* 12 How. 443), of navigable waters for tide waters. Thus, in the case of *The Philadelphia, Wilmington & Baltimore R. R. Co.* v. *The Philadelphia & Havre de Grace Steam Towboat Co.,* 23 How. 209, 215, the court said: 'The jurisdiction of courts of admiralty, in matters of contract, depends upon the nature and character of the contract; but in torts, it depends entirely on locality.' Again, in the case of *The Plymouth,* 3 Wall. 20, where jurisdiction was denied upon the ground that the substance and consummation of the wrong took place on land and not on navigable water, the court said, p. 35: 'The jurisdiction of the admiralty over maritime torts does not depend upon the wrong having been committed on board the vessel, but upon its having been committed upon the high seas or other navigable waters.—A trespass on board of a vessel, or by the vessel itself, above tide-water, when that was the limit of jurisdiction, was not of admiralty cognizance. The reason was, that it was not committed within the locality that gave the jurisdiction. The vessel itself was unimportant. . . . The jurisdiction of the admiralty does not depend upon the fact that the injury was inflicted by the vessel, but upon the locality—the high seas, or navigable waters where it occurred. Every species of tort, however occurring, and whether on board a vessel or not, if upon the high seas or navigable waters, is of admiralty cognizance.' See *Manro* v. *Almeida,* 10 Wheat. 473; *Waring* v. *Clarke, supra,* p. 459; *The Lexington,* 6 How. 344, 394; *The Commerce,* 1 Black, 574, 579; *The Rock Island Bridge,* 6 Wall. 213, 215; *The Belfast,* 7 Wall. 624, 637; *Ex parte Easton,* 95 U. S. 68, 72; *Leathers* v. *Blessing,* 105 U. S. 626, 630; *Panama Railroad* v. *Napier Shipping Co.,* 166 U. S. 280, 285; *The Blackheath,* 195 U. S. 361, 365, 367; *Cleveland Terminal & Valley R. R. Co.* v. *Cleveland Steamship*

Co., 208 U. S. 316, 319; *Martin* v. *West*, 222 U. S. 191; *The Neil Cochran*, Fed. Cas. No. 10,087; *The Ottawa*, Fed. Cas. No. 10,616; *Holmes* v. *O. & C. Rwy. Co.*, 5 Fed. Rep. 75, 77; *The Arkansas*, 17 Fed. Rep. 383, 384; *The F. & P. M.* No. 2, 33 *Fed. Rep.* 511, 513; *The H. S. Pickands*, 42 Fed. Rep. 239, 240; *Hermann* v. *Port Blakely Mill Co.*, 69 Fed. Rep. 646, 647; *The Strabo*, 90 Fed. Rep. 110; 2 Story on the Constitution, § 1666. It is also apparent that Congress in providing for the punishment of crimes committed upon navigable waters has regarded the locality of the offense as the basis for the exercise of its authority. Act of April 30, 1790, c. IX, § 8, 1 Stat. 112, 113; act of March 3, 1825, c. LXV, 4 Stat. 115; Rev. Stat. §§ 5339, 5345, 5346; Criminal Code, § 272, 35 Stat. 1088, 1142; *United States* v. *Bevans*, 3 Wheat. 336, 387; *United States* v. *Wiltberger*, 5 Wheat. 76; *United States* v. *Rodgers*, 150 U. S. 249, 260, 261, 285; *Wynne* v. *United States*, 217 U. S. 234, 240.

"But the petitioners urge that the general statements which we have cited, with respect to the exclusiveness of the test of locality in cases of tort, are not controlling; and that in every adjudicated case in this country in which the jurisdiction of admiralty with respect to torts has been sustained, the tort apart from the mere place of its occurrence has been of a maritime character. It is asked whether admiralty would entertain a suit for libel or slander circulated on board a ship by one passenger against another. See Benedict, Admiralty, 4th ed., § 231. The appropriate basis, it is said, of all admiralty jurisdiction, whether in contract or in tort, is the maritime nature of the transaction or event; it is suggested that the wider authority exercised in very early times in England may be due to its antedating the recognition by the common-law courts of transitory causes of action and thus arose by virtue of necessity.

"We do not find it necessary to enter upon this broad inquiry. As this court has observed, the precise scope of admiralty jurisdiction is not a matter of 'obvious principle or of very accurate history,' *The Blackheath, supra.* And we are not now concerned with the extreme cases which are hypothetically presented. *Even if it be assumed that the requirement as to locality in tort cases, while indispensable, is not necessarily exclusive, still in the present case the wrong which was the subject of the suit was, we think, of a maritime nature and hence the District Court, from any point of view, had jurisdiction.* The petitioner contends that a maritime tort is one arising out of an injury to a ship caused by the negligence of a ship or a person or out of an injury to a person by the negligence of a ship; that there must either be an injury to a ship or an injury by the negligence of the ship, including therein the negligence of her owners or mariners; and that, as there was no negligence of the ship in the present case, the tort was not maritime. This view we deem to be altogether too narrow.

"The libelant was injured on a ship, lying in navigable waters, and while he was engaged in the performance of a maritime service. We entertain no doubt that the service in loading and stowing a ship's cargo is of this character. Upon its proper performance depends in large measure the safe carrying of the cargo and the safety of the ship itself; and it is a service absolutely necessary to enable the ship to discharge its maritime duty. Formerly the work was done by the ship's crew; but owing to the exigencies of increasing commerce and the demand for rapidity and special skill, it has become a specialized service devolving upon a class 'as clearly identified with maritime affairs as are the mariners.' See *The George T. Kemp,* 2 Lowell, 477, 482; *The Circassian,* 1 Ben. 209; *The Windermere,* 2 Fed. Rep. 722; *The Canada,* 7 Fed. Rep. 119; *The*

The Hattie M. Bain, 20 Fed. Rep. 389; *The Gilbert Knapp*, 37 Fed. Rep. 209; *The Main*, 51 Fed. Rep. 954; *Norwegian Steamship Co.* v. *Washington*, 57 Fed. Rep. 224; *The Seguranca*, 58 Fed. Rep. 908; *The Allerton*, 93 Fed. Rep. 219; Hughes, Adm. 113; Benedict, Adm., 4th ed., § 207. The libelant was injured because the care required by the law was not taken to protect him while he was doing this work. We take it to be clear that the District Court sitting in admiralty was entitled to declare the applicable law in such a case, as it was within the power of Congress to modify that law. *Waring* v. *Clarke, supra; The Lottawanna, supra.* The fact that the ship was not found to be liable for the neglect is not controlling. *If more is required than the locality of the wrong in order to give the court jurisdiction, the relation of the wrong to maritime service, to navigation and to commerce on navigable waters, was quite sufficient.*" *Atlantic Transport Co.* v. *Imbrovek*, 234 U.S. 52, 58-62 (1914). (Emphasis added.)

The more modern and more liberal interpretation of the scope of admiralty jurisdiction is perhaps best illustrated in *Calbeck* v. *Travelers Insurance Co.*, 370 U.S. 114, 117 (1962), where the Court said:

> "Our conclusion is that Congress invoked its constitutional power so as to provide compensation *for all injuries sustained by employees on navigable waters* whether or not a particular injury might also have been within the constitutional reach of a state workmen's compensation law." (Emphasis added and footnote omitted.)

In the most recent decision concerning admiralty jurisdiction, the Court continued its expansion of the effective boundaries of admiralty. *Moragne* v. *States Marine Lines, Inc.*, 398 U.S. 375 (1970). In foreshadowing probable ap-

plication of the Death on the High Seas Act to deaths on territorial waters, the Court said:

> "However, it is sufficient at this point to conclude, as Mr. Justice Holmes did 45 years ago, that the work of the legislatures has made the allowance of recovery for wrongful death the general rule of American law, and its denial the exception. Where death is caused by the breach of a duty imposed by federal maritime law, Congress has established a policy favoring recovery in the absence of a legislative direction to except a particular class of cases." *Id.* at 393.

SIXTH CIRCUIT ADMIRALTY CASES

In *Smith* v. *Lampe,* 64 F.2d 201 (6th Cir.), *cert. denied,* 289 U.S. 751 (1933), Judge Simons stated the traditional test of maritime jurisdiction for this Circuit, saying, "Where the negligent act originates on land and the damage occurs on water, the cause of action is within the admiralty jurisdiction." *Id.* at 202.

Essentially, this view was reiterated in *Interlake Steamship Company* v. *Nielsen,* 338 F.2d 879 (6th Cir. 1964), *cert. denied,* 381 U.S. 934 (1965), in upholding admiralty jurisdiction over a harbor worker's federal compensation case wherein a ship's custodian was killed when in the course of his employment he drove a car off the end of the dock where his ship was berthed.

The District Judge in dismissing the instant complaint for lack of jurisdiction relied strongly upon language found in more recent opinions of this court in *Chapman* v. *City of Grosse Pointe Farms,* 385 F.2d 962 (6th Cir. 1967), and *Wiper* v. *Great Lakes Engineering Works,* 340 F.2d 727 (6th Cir.), *cert. denied,* 382 U.S. 812 (1965). The District Judge read these cases as accepting the proposition that the locus of the tortious conduct, rather than the locus of the damage, was the determining factor in relation to ad-

miralty jurisdiction. While there is dictum in *Wiper* (a drowning case alleging faulty maintenance of a pier) which lends some support to this conclusion, we believe that *Chapman* adopted (and arguably extended) the rationale of the *Imbrovek* case which is quoted above. The holding in *Chapman* was:

> "While the locality alone test should properly be used to exclude from admiralty courts those cases in which the tort giving rise to the lawsuit occurred on land rather than on some navigable body of water, it is here determined that jurisdiction may not be based solely on the locality criterion. A relationship must exist between the wrong and some maritime service, navigation or commerce on navigable waters." *Chapman* v. *City of Grosse Point Farms, supra* at 966.

In *Gowdy* v. *United States*, 412 F.2d 525 (6th Cir.), *cert. denied*, 396 U.S. 960 (1969), two judges reiterated the *Chapman* rule in the context of a tort case where a workman fell from the flat roof of a lighthouse building to the ground. The lighthouse was at the end of a land-connected breakwater, and the opinion of the court found no maritime character to the tort claim which alleged negligent maintenance of the roof.

The holding of *Chapman* has been praised in The American Law Institute, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS, § 232 (1969), which presents the point of view of critics of the "locality alone" test. It is interesting to note, however, that even the RESTATEMENT (SECOND) OF CONFLICT OF LAWS with its emphasis upon the state of the most significant relationship to the occurrence and the parties gives a distinct preference to "the local law of the state where the injury occurred" in tort actions involving both personal injury and property damage. RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 146 and 147 (1971).

I think, however, that the proper application of *Chapman* to the facts of our instant case is best shown by the language it employed to distinguish aircraft crash cases —more particularly, the *Weinstein* case:

> "It might be said that some relationship between the alleged wrong and maritime service, navigation or commerce on navigable waters, is a condition *sub silentio* to admiralty jurisdiction. Indeed, in Weinstein v. Eastern Airlines, Inc., 316 F.2d 758 (3rd Cir. 1963), a wrongful death case arising from a plane crash into Boston Harbor, the court was able to reconcile *McGuire, supra,* with its conclusion that locality of the injury was the exclusive determinant of admiralty jurisdiction (p. 763, n. 13):
>
> > " 'The result reached in McGuire v. City of New York, 192 F. Supp. 866 (S.D. N.Y. 1961) may well be compatible with the "locality alone" test. To say that a person bathing in the shallow, and probably un-navigable in fact, waters of a public beach is within the locus of admiralty jurisdiction would be to distort the meaning of the locality test beyond what reason and policy would suggest or require.'
>
> "In making this concession, it appears that *Weinstein* does in fact accept the 'locality plus' test, notwithstanding the declaration as to the propriety of the 'locality alone' criterion. In addition, the court also noted that aircraft had become 'a major instrument of travel and commerce over and across' navigable waters, and that the dangers of plane crashes into navigable waters 'are much the same as those arising out of the sinking of a ship or a collision between two vessels.' Id. at 763." *Chapman* v. *City of Grosse Pointe Farms, supra* at 966.

HOLDING

I regret that I cannot agree with the majority holding in this case. There is nothing more maritime than the sea. *Pure Oil Co.* v. *Snipes,* 293 F.2d 60, 65 at n.6 (5th Cir. 1961).

I believe that there are many comparisons between the problems of aircraft over navigable waters and those of the ships which the aircraft are rapidly replacing. We should take judicial notice that thousands of flights of aircraft take off daily (many from waterfront airports like Cleveland's Burke Lakefront) with flights planned over the oceans or over the Great Lakes.

I have previously noted that Congress appears to have thought that admiralty jurisdiction attached solely by flight over the high seas. We have, however, no need to go that far in our instant case. We deal here with a disabled plane which crashed upon and sank into the navigable waters of the Great Lakes. Problems posed for aircraft landing on, crashing on, or sinking into navigable waters differ markedly from landings upon land. Arguably, they might be greater or less, but they are not the same. In such instances, wind and wave and water, the normal problems of the mariner, become the approach or survival problems of the pilot and his passengers. I do not, by referring generally to these matters as being within judicial notice, mean to pass judgment on jurisdictional problems beyond the specific requirements of this case. What I would hold is that tort cases arising out of aircraft crashes into navigable waters are cognizable in admiralty jurisdiction even if the negligent conduct is alleged to have happened wholly on land. By so doing, we would follow the reasoning and result of the *Imbrovek* case and apply it to the facts of this case:

> "If more is required than the locality of the wrong in order to give the court jurisdiction the relation of the wrong to maritime service, to navigation and to com-

merce on navigable waters, was quite sufficient." *Atlantic Transport Co.* v. *Imbrovek,* 234 U.S. 52, 62 (1914).

Here the aircraft took off from a shorefront airport; its flight path led over navigable waters (if only for a brief distance); when disabled, it fell into navigable waters; and the damage complained of is damage occasioned by crashing into and sinking into navigable waters.[4]

We cannot by any means be sure that the Supreme Court will not adhere or revert to the "locality alone" test, but in the meantime we should note that there is some maritime character to any flight of any airplane over any navigable water.

If, as a result of shore-based negligence in dry dock, a sea valve were left open on a deep-water vessel, would anyone doubt admiralty jurisdiction over cases arising from its subsequent sinking?

I think we should adopt the Third Circuit rule of *Weinstein, supra.*

> "We hold, therefore, that tort claims arising out of the crash of a land-based aircraft on navigable waters within the territorial jurisdiction of a state are cognizable in admiralty." 316 F.2d at 766.

This would not require endorsing its "locality alone" test, but, as is obvious from what has been said, I would accept fully much of Judge Biggs' reasoning, including the following:

> "Assuming *arguendo* that some kind of maritime nexus in addition to locality is required as a prerequisite to admiralty tort jurisdiction, we believe none-

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[4] I attach no significance to the fact that the descending plane struck the top of a truck and the perimeter fence of the airport before crashing into Lake Erie. This record makes clear that the impact on the water and the sinking of the plane with its consequent water damage accomplished the destruction complained of.

theless that the cases at bar are within the admiralty jurisdiction insofar as the tort claims alleged therein are concerned. At the time the Constitution was framed and for a century and a half thereafter, ships of various kinds were the only means of transportation and commerce on or across navigable waters. Today, aircraft have become a major instrument of travel and commerce over and across these same waters. When an aircraft crashes into navigable waters, the dangers to persons and property are much the same as those arising out of the sinking of a ship or a collision between two vessels." *Id.* at 763.

Aside from *Weinstein, supra,* and *Scott* v. *Eastern Airlines, Inc.,* 399 F.2d 14 (3d Cir.), *cert. denied,* 393 U.S. 979 (1968), where the Third Circuit reaffirmed *Weinstein,* there is no precedent squarely in point concerning airplane crashes in navigable waters of a state either from the Circuit Courts of Appeal or the United States Supreme Court. But there are many District Court cases, both before and after *Weinstein,* which have reached the same result. *Hornsby* v. *Fishmeal Co.,* 285 F. Supp. 990, 993 (W.D.La. 1968), *rev'd on other grounds,* 431 F.2d 865 (5th Cir. 1970); *Rapp* v. *Eastern Airlines, Inc.,* 264 F. Supp. 673 (E.D.Pa. 1967), *aff'd sub. nom. Scott* v. *Eastern Airlines, Inc.,* 399 F.2d 14 (3d Cir.), *cert. denied,* 393 U.S. 979 (1968); *Horton* v. *J & J Aircraft, Inc.,* 257 F. Supp. 121 (S.D.Fla. 1966); *Montgomery* v. *Goodyear Tire & Rubber Co.,* 231 F.Supp. 447, 453 (S.D.N.Y. 1964), *aff'd,* 392 F.2d 777 (2d Cir. 1968); *Harris* v. *United Airlines,* 275 F. Supp. 431 (S.D.Iowa 1967). *See also Stiles* v. *National Airlines, Inc.,* 161 F. Supp. 125 (E.D.La. 1958), *aff'd* 268 F.2d 400 (5th Cir.), *cert. denied,* 361 U.S. 885 (1959); *Noel* v. *Airponents, Inc.,* 169 F. Supp. 348 (D.N.J. 1958); *Bergeron* v. *Aero Associates, Inc.,* 213 F. Supp. 936 (E.D.La. 1963); *Wilson* v. *Transocean Airlines,* 121 F. Supp. 85 (N.D.Cal. 1954).

For the reasons outlined, I would reverse and remand the judgment of the District Court.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Civil Action No. C69-464

EXECUTIVE JET AVIATION, INC. and EXECUTIVE JET SALES, INC., *Plaintiffs*

v.

CITY OF CLEVELAND, OHIO, East 6th and Lakeside Avenue, Cleveland, Ohio

PHILLIP A. SCHWENZ, 724 Sandlewood, Elyria, Ohio

and

HOWARD E. DICKEN, 23225 Cedar Point Road, Cleveland, Ohio, *Defendants*

Memorandum and Order
Re: Motions To Dismiss

[Filed June 12, 1970]

KALBFLEISCH, J.

The instant case arises from the crash of a Falcon Mystere jet aircraft into the waters of Lake Erie near Burke Lakefront Airport at Cleveland, Ohio, on July 28, 1968. At the time of the accident there were three persons aboard the Falcon aircraft, all crew members, none of whom were injured.

The plaintiffs in the case are Executive Jet Sales, Inc., and Executive Jet Aviation, Inc., the former is alleged to be the owner of the Falcon, while the latter operated the aircraft. The complaint invokes the admiralty jurisdiction of the Court and seeks damages for total loss of the Falcon. Though the aircraft was never replaced, the prayer also

includes an amount for loss of revenue from operation of the Falcon during the reasonable period of time required for replacement.

At the time of the accident, defendant City of Cleveland owned the airport and employed Phillip A. Schwenz to manage it. Defendant Howard E. Dicken was the air traffic controller on duty at the time of the accident.

The defendants have moved to dismiss the action on the ground that the undisputed facts presently before the Court demonstrate that the claim asserted by the plaintiffs is not cognizable in admiralty and therefore the Court is without jurisdiction over the subject matter. Plaintiffs argue, on the other hand, that the complaint states a case in admiralty and that the allegations thereof are not so cast into doubt by the other material before the Court as to warrant dismissal for lack of jurisdiction.

In ruling on a motion to dismiss for lack of jurisdiction over the subject matter, the allegations of the complaint must be construed most strongly in favor of the plaintiff. *Dautartas* v. *Trans World Airlines,* Civil No. C65-617, N.D. Ohio (1966).

Relevant to the issues here, the complaint alleges:

> "6. On July 28, 1968, plaintiffs' Falcon aircraft taxied on and took off from the airport, all under the direct supervision and control of one or more of the defendants. On said date defendant Howard E. Dicken cleared the Falcon for take off from the airport.
>
> "7. On or about July 28, 1968, defendant Howard E. Dicken negligently and carelessly supervised and controlled, or failed to supervise and control, plaintiffs' Falcon; and negligently and carelessly failed to warn plaintiffs of hazards to aircraft existing on, over and adjacent to the airport of which defendant Howard E. Dicken knew or should have known, including a huge flock of seagulls which were sitting on the active

runway of the airport at the time defendant Howard E. Dicken cleared plaintiffs' Falcon for takeoff from said runway.

"8. On and before July 28, 1968, the city and defendant Phillip A. Schwenz, and each of them, negligently and carelessly operated, controlled, maintained, supervised and inspected the airport; negligently and carelessly failed to remove and eliminate hazards to aircraft existing on, over and adjacent to the airport, including the aforementioned flock of seagulls; and negligently failed to warn plaintiffs of hazards to aircraft existing on, over and adjacent to the airport of which the city and defendant Phillip A. Schwenz knew or should have known, including the aforementioned flock of seagulls.

"9. As a result of the aforesaid negligence and carelessness of defendants, and each of them, plaintiffs' Falcon struck several hundred seagulls shortly after take off from the airport when the flock flushed; and the Falcon was totally destroyed when it crashed and sank in the navigable waters of Lake Erie off shore from the airport, all to plaintiffs' damage in the sum of One million, five hundred fifty thousand dollars ($1,550,000.00).

"10. As a further result of this negligence and carelessness plaintiffs were deprived of the use of the Falcon for the period reasonably required to obtain a replacement aircraft, the reasonable rental value for this period being Two hundred thousand dollars ($200,000.00).

"11. As a further result of this negligence and carelessness, plaintiffs incurred salvage, raising and other costs in the sum of Thirteen thousand, six hundred forty-three dollars and 64 cents ($13,643.64)."

In addition to the allegations set out above, there are certain undisputed facts which appear in the documents

presently before the Court. There is no question that the aircraft struck the gulls while passing over a portion of the runway upon which it had taken off. Further, there was a substantial loss of power from the plane's engines either immediately when, or at some time shortly after the Falcon encountered the birds; in either case, the loss of power occurred while the plane was still above the land.

Also, the aircraft struck the perimeter fence of Burke Lakefront Airport and also came into contact with the top of a pick-up truck which was parked outside of the airport grounds.

In answer to an interrogatory posed by defendant City of Cleveland, the plaintiffs have submitted the joint statement of W. P. Flower and Charles E. Dirk, who were piloting the Falcon at the time of the crash. Neither plaintiffs nor the defendants take issue with the factual details narrated in the statement, which reads, in part, as follows:

> "After clearance to take-off was received the pilot in the left seat executed the take-off and rotated at approximately 125 Kts. The pilot in the right seat made a power check, voiced 30 Kts., 100 Kts., V_1 and rotate. The pilot in the left seat could not distinguish the bird line prior to rotation and in his estimation could not abort the take-off. On rotating a sea of birds on the runway became visible. Approaching the birds at approximately 75 feet caused them to flush and fly into the aircraft * * *. Bird impact substantially reduced the air speed an estimated 15 or 20 Kts. The pilot in the left seat raised the gear handle, the pilot in the right seat maneuvered the throttles in an effort to obtain partial power. There was almost immediate total loss of power. The engine temperature indicated above 850 degrees on both engines and the RPM dropped rapidly below 70%. The aircraft flew in a semi-stalled attitude stall horn blowing until contacting the water. The aircraft struck the top of a pick-up truck and a portion of the airport perimeter fence.

The aircraft contacted the water in a flat attitude and on a second impact water entered the cabin almost immediately. Only a few seconds passed between bird impact and water contact and it is estimated that the aircraft did not attain more than 75 to 100 feet in altitude."

There is no genuine issue as to any of the facts set out above. The disagreement among the parties, as evidenced by the briefs supporting and opposing the motions, is not over the hard facts of the case, but rather over how the facts are to be characterized, what the present state of the law is on the issue, and how the law is to be applied to resolve the jurisdictional issue.

There is no question that the plane encountered the perimeter fence of the airport, the top of a pick-up truck and the navigable waters of Lake Erie. In the view which this Court takes of the law, it matters not whether the plane "crashed" into the fence and truck and "eventually came to rest" in Lake Erie, or whether it "grazed" the fence and truck and "crashed" into Lake Erie. For the purpose of the motions, however, the Court assumes the plaintiffs' position that the damage to the plane from contact with the birds, fence and truck was minimal compared to the total destruction of the aircraft when it "crashed and sank in the navigable waters of Lake Erie * * *." (Complaint, para. 9.)

The basic issue is whether the allegations of the complaint read in light of the undisputed facts state a case within the realm of this Court's admiralty jurisdiction. The perimeter of admiralty jurisdiction has been the subject of continuing definition by federal courts at all levels. In arguing the instant motions, the parties have briefed that area of the law extensively; the sharp difference of opinion as to how the many cases are to be interpreted demonstrates that the reach of this Court's admiralty jurisdiction is still not clearly defined.

The controversy here centers around two questions: first, What is the proper legal standard by which admiralty jurisdiction is to be tested?; and second, Does the claim in this case meet that standard? Turning to the first question, the traditional principle is well-stated in *The Philadelphia, Wilmington & Baltimore R.R. Co.* v. *The Philadelphia & Havre de Grace Steam Towboat Co.*, 64 U.S. 209 (1859):

> "The jurisdiction of courts of admiralty, in matters of contract, depends upon the nature and character of the contract; but in torts, it depends entirely on locality." (At p. 215.)

The principle as it relates to torts has come to be known as the "locality-alone" test of jurisdiction and, in its strict application, entails an inquiry only as to where the tort occurred: if upon navigable waters, the action is cognizable in admiralty; if not, then the action is without the admiralty jurisdiction of the court.

It is the "locality-alone" test of jurisdiction which plaintiffs argue to be the proper standard here and the position is supported by a myriad of cases, many of which have been cited by the plaintiffs in the briefs opposing the instant motions.

However, the Court of Appeals for the Sixth Circuit has recently considered the propriety of the "locality-alone" test and has rejected it. In *Chapman* v. *City of Grosse Pointe Farms*, 385 F.2d 962 (6th Cir. 1967), the plaintiff was injured when he dived from a pier owned and operated by the defendant. There were diving boards on the end of the pier for use by swimmers, but the plaintiff apparently dived from some other portion of the pier into approximately eighteen inches of water. The claim was that the defendant was negligent in failing to erect barriers along the pier or to adequately warn of the shallow waters along the side of the pier. After finding that the tort had occurred on navigable waters, the court met squarely the

issue of whether the "locality-alone" test is the proper jurisdictional standard. Said the court:

> "While the locality alone test should properly be used to exclude from admiralty courts those cases in which the tort giving rise to the lawsuit occurred on land rather than on some navigable body of water, it is here determined that jurisdiction may not be based solely on the locality criterion. A relationship must exist between the wrong and some maritime service, navigation or commerce on navigable waters. Absent such a relationship, admiralty jurisdiction would depend entirely upon the fact that a tort occurred on navigable waters; a fact which in and of itself, in light of the historical justification for federal admiralty jurisdiction, is quite immaterial to any meaningful invocation of the jurisdiction of admiralty courts." (At p. 966. Citations omitted.)

In *Weinstein* v. *Eastern Airlines, Inc.*, 316 F.2d 758 (3rd Cir. 1963), a case relied upon heavily by the plaintiffs, the court specifically rejected the argument that some maritime nexus is needed for admiralty jurisdiction in addition to a tort which occurred on navigable waters. As noted in *Weinstein*, the argument is not a new one and the weight of authority is in favor of the "locality-alone" test. Despite this weight of authority, the *Chapman* case, supra, expressly binds the Sixth Circuit to the minority position which requires some maritime nexus in addition to a finding that the tort occurred upon navigable waters.

The plaintiff would read the *Chapman* case as holding that, in addition to the tort having occurred upon navigable waters, there need be a relationship between the wrong and some maritime service, navigation or commerce on navigable waters only in those "troublesome borderline cases" where there is some difficulty in determining whether or not the tort occurred upon navigable waters. This position is without merit. The opinion in *Chapman* first dealt

with the question of whether the tort in that case had occurred on navigable waters. Regarding that question, the court stated, at page 964:

> "However, a number of troublesome borderline cases have arisen * * *. Without attempting to distinguish and reconcile each of the above cases, it appears that the governing principle common to all is that reference should properly be made to the locality where 'the substance and consummation of the occurrence which gave rise to the cause of action took place * * *.' Minnie v. Port Huron Terminal Co., supra, note 8, 295 U.S. at 649, 55 S. Ct. at 885, or, as suggested in Thomson v. Chesapeake Yacht Club, Inc., supra, note 5 at 558, 'to the place where the negligent act or omission *becomes operative or effective* upon the plaintiff * * *.' In these cases, it is apparent that application of the mechanical place of the injury or impact test is impossible, for a claimant has usually suffered some injurious impact upon both land and water."

The court then applied the standard which it deemed appropriate to the circumstances of the case and determined that the locality of the tort was upon navigable waters. Only then did the court consider and decide that locality of the tort alone is insufficient to confer admiralty jurisdiction. This latter holding was not limited to borderline cases where the locality of the tort could not be easily ascertained.

Thus, it is the opinion of the Court that the proper procedure here is one which first looks to the threshold question of locality of the tort. If it can be found that the tort occurred upon navigable waters, then further inquiry must be made into the "condition *sub silentio*" (Chapman, supra), i.e., that there be some connection between the alleged wrong and some maritime service, navigation or commerce upon navigable waters. As will be set out below, in detail, the Court finds the case fails to meet both criteria.

Turning to the locality of the tort in this action, the many cases involving the crash of an airplane into navigable waters which have held the locality of the tort to be upon the water would appear to require a similar conclusion here. Cf. *Weinstein* v. *Eastern Airlines, Inc.*, supra; *Scott* v. *Eastern Airlines, Inc.*, 399 F.2d 14 (3rd Cir. 1968); *Harris* v. *United Air Lines, Inc.*, 275 F.Supp. 431 (S.D. Iowa 1967). A most perplexing aspect of the aircraft cases has been the difficulty in defining where the tort occurred, especially in those cases where the acts of negligence alleged occurred upon or over land even though the plane came down in navigable waters. In *Thomson* v. *Chesapeake Yacht Club*, 255 F.Supp. 555 (D. Md. 1966), the court commented:

> "The aircraft cases present special problems. Although the negligence may have occurred on land, where there was negligent maintenance, the impact (effect) of the negligence on the passengers did not occur until something went wrong during the flight and the plane started to fall. Something may have started to go wrong over the land before the plane reached the sea, but that is usually impossible to prove one way or the other in aircraft cases, and the decisions adopt a practical approach." (P. 558.)

Thus, for purposes of determining jurisdiction, even though the negligent acts occur on the land, if the impact of the tortious conduct takes place over navigable water, the cases hold that the tort "occurred" on navigable water. See *Lavello* v. *Danko*, 175 F.Supp. 92 (S.D. N.Y. 1959); *Weinstein* v. *Eastern Airlines, Inc.*, supra; *Wilson* v. *Transocean Airlines*, 121 F.Supp. 85 (N.D. Calif. 1954). In *Thomson* v. *Chesapeake Yacht Club, Inc.*, supra, the court interpreted the various cases, including those involving aircraft, with regard to the test for locality. The opinion states:

> "It might be more accurate to refer to the place where the negligent act or omission *becomes operative*

> *or effective* upon the plaintiff, so as to cause an injury to him, whether the physical injury and damage is suffered and completed on land or in navigable water. That is substantially the test which was applied in The Admiral Peoples, The Strabo, Wiper and other cases." (P. 558.)

In this case the alleged negligence occurred upon land and the damage for which recovery is sought occurred upon Lake Erie. Without looking to the other circumstances of the accident, it could be said, as plaintiffs argue, that the "impact" of the alleged negligence, with reference to the ultimate total destruction of the aircraft, occurred upon navigable waters.

However, there is no question in this case that, after the alleged negligence but before the ultimate crash into Lake Erie, the aircraft struck a number of sea gulls, that there was an immediate loss of power, that the crippled aircraft came into contact with the airport's perimeter fence, that it grazed the top of a pick-up truck parked outside the airport, and only then did the plane enter into the space above Lake Erie, eventually to crash and sink in its waters. Ignoring the fact that some comparatively small amount of damage to the aircraft must have been occasioned by its contact with the gulls, the fence and the truck, it is only by blindly applying a legal fiction that the Court could say in this case that the alleged negligence did not have its "impact" upon, or "become operative and effective" upon the plane until it crashed into the water. As noted in the *Thomson* case, supra, the rule which plaintiffs urge was developed in cases where it was impossible to prove whether or not something "started to go wrong over the land before the plane reached the sea * * *." (At p. 558.)

In this case it is manifest that the alleged negligence became operative upon the aircraft while it was over the land; and in this sense the "impact" of the alleged negligence

occurred when the gulls disabled the plane's engines. Turning again to the opinion of the court in *Chapman,* it is stated, at page 965:

> "In cases such as *The Admiral Peoples and Wiper,* cited above (footnotes 2 and 4), the negligent act or force responsible for the injury resulted in a direct impact upon plaintiff, while the alleged negligence in the instant case was the failure to restrain appellant by means of warning signs or physical barriers from performing a voluntary act. This distinction might as [sic] first seem inconsequential, but it must be noted that where a negligent act or force knocks a person down or causes him to fall, whether he comes down on land or water is largely fortuitous."

Applying the same analysis to this case, the alleged negligence, the take-off, the striking of the gulls and resultant loss of power occurred upon the land. From this point on the plane was disabled and was caused to fall. Whether it came down upon land or upon water was largely fortuitous.

In *Wiper* v. *Great Lakes Engineering Works,* 340 F.2d 727 (6th Cir. 1965), the plaintiff's decedent was alleged to have fallen from a dock and to have died from drowning. The defendant was charged with negligence in maintenance of the dock. The court stated, at page 730:

> "However, docks and wharves are considered as extensions of land, American Export Lines, Inc. v. Revel, 266 F.2d 82 (4th Cir. 1959); Netherlands American Steam Nav. Co. v. Gallagher, 282 F. 171 (2nd Cir. 1922); The Plymouth, 3 Wall. 20, 70 U.S. 20, 18 L.Ed. 125 (1865); Hughes, Admiralty (2d Ed.) Sec. 198; 2 Am. Jur. 741, 767-768, ADMIRALTY Sec. 84, and therefore the negligently maintained dock which presumably caused the decedent to fall was land, and the decedent was on land at the time he was caused to fall. Thus, the tort was complete before decedent ever

> touched the water and this being true, the subsequent drowning is significant not to determine the maritime or non-maritime nature of this action but only as it relates to damages * * *."

Likewise, in this case the airport and the runway were upon land and the alleged negligence which caused the plane to crash occurred upon land. Further, the plane became disabled over land and came into contact with a fence and a truck before ever crossing the shoreline. It is this Court's opinion that the eventual crash of the plane into Lake Erie, and its destruction by water, are at best fortuitous and are significant "not to determine the maritime or non-maritime nature of this action but only as it relates to damages." (*Wiper*, supra.)

It is the opinion of the Court, therefore, that the tort in this case did not occur upon navigable waters and the action is not cognizable in admiralty. In reaching this conclusion, the Court is well aware of the many decisions holding that a plane crash into navigable waters is within admiralty jurisdiction. However, as the analysis above reveals, drawing from those cases a general rule that all plane crashes into navigable waters are cognizable in admiralty and applying such a rule here would belie the principles which governed locality of the tort before the problems peculiar to air commerce arose. Where the facts are not known, a court might rightly assume that the alleged negligence became operative and effective upon the aircraft over navigable waters; but here the alleged negligence had crippled the plane well before it reached the water. Assuming otherwise would require that the Court ignore the very facts upon which it must rely in testing jurisdiction. Without distinguishing each of the cases involving an airplane crash into navigable waters, it is sufficient to state that the undisputed facts in this case demonstrate that the tort occurred over the land.

As to the second prerequisite for admiralty jurisdiction—that there be a relationship between the alleged wrong

and some maritime service, navigation or commerce upon navigable waters—in *Weinstein* v. *Eastern Airlines, Inc.*, supra, the court stated:

> "Assuming *arguendo* that some kind of maritime nexus in addition to locality is required as a prerequisite to admiralty tort jurisdiction, we believe nonetheless that the cases at bar are within the admiralty jurisdiction insofar as the tort claims alleged therein are concerned. At the time the Constitution was framed and for a century and a half thereafter, ships of various kinds were the only means of transportation and commerce in or across navigable waters. Today, aircraft have become a major instrument of travel and commerce over and across these same waters. When an aircraft crashes into navigable waters, the dangers to persons and property are much the same as those arising out of the sinking of a ship or a collision between two vessels. 'There can be nothing more maritime than the sea.' Pure Oil Co. v. Snipes, 293 F.2d 60, 65 at n. 6 (5 Cir. 1961)." (At p. 763.)

In *Chapman* v. *City of Grosse Pointe Farms*, supra, the court quoted these same words from the *Weinstein* case as an example of its conclusion that some maritime nexus had been required as a condition "sub silentio" to admiralty jurisdiction by many courts which outwardly voiced adherence to the "locality-alone" test.

The Court does not view either the *Weinstein* case or the *Chapman* case as persuasive authority that there is always a relation between the alleged wrong and some maritime service, navigation or commerce on navigable waters whenever an aircraft crashes into navigable waters. In the *Weinstein* case, the statement was manifestly uttered by way of dicta; and the *Chapman* opinion cited the comment of *Weinstein* only to illustrate that other courts have been concerned with maritime nexus even while denying that

it is a prerequisite to jurisdiction. There was little indication as to how the Court of Appeals for the Sixth Circuit might rule if considering de novo the question which the court in *Weinstein* resolved by way of dicta.

In *Gowdy* v. *United States*, 412 F.2d 525 (6th Cir. 1969), the maritime nexus requirement of the *Chapman* case was further defined. The court emphasized in the *Gowdy* case that it is the alleged "wrong" which must bear a relationship to some maritime service, navigation or commerce on navigable waters. The plaintiff in that case was installing electrical machinery in a lighthouse when he fell from the lighthouse and sustained injuries. The court stated, at pages 528-29:

> "Nor is the fact that the lighthouse itself serves a maritime purpose sufficient to require in this case application of maritime law.
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> "Here the 'wrong' if any, involved the failure of a landowner to provide a guardrail or some type of warning for business invitees using the property. The invitees were an electrical construction company and its employees engaged in the installation of new machinery in the machinery house. The company was not a maritime contractor, and its employees were not seamen, longshoremen or harbor workers.
>
> "The 'wrong' bears no relationship whatsover to 'some maritime service, navigation or commerce on navigable waters.' The application of maritime law in this case would not, therefore, serve the purpose of uniformity in the area of maritime commerce."

Assuming, as the court noted in the *Weinstein* case, supra, that air commerce bears some relationship to maritime commerce when the former is carried out over navigable waters, the relevant circumstances here were unconnected with the maritime facets of air commerce. The claimed

"wrong" in this case was the alleged failure to keep the runway free of birds and the failure to adequately warn the pilots of their presence upon the end of the runway. When the alleged negligence occurred, and when it became operative upon the aircraft, all the parties were engaged in functions common to all air commerce, whether over land or over sea.

There is no contention here that the entire spectrum of air travel is imbued with a maritime character merely because some airplanes at certain times might pass over navigable waters. Thus, the conclusion here must be that the operative facts of the claim in this case are concerned with the land-connected aspects of air commerce, namely, the maintenance and operation of an airport located on the land and the dangers encountered by an aircraft when using its runways for take-off. It is the Court's opinion that there exists no relationship between the "wrong" alleged in this case and some maritime service, navigation or commerce upon navigable waters.

For the reasons stated above, the case is not cognizable in admiralty.

There appearing in the complaint no allegations upon which jurisdiction might be based other than the averment that the case falls within the admiralty and maritime jurisdiction of the Court, the Court has no jurisdiction over the subject matter of the action as alleged. The complaint must, therefore, be dismissed.

As to the third-party action against the United States of America filed by defendants City of Cleveland and Phillip A. Schwenz, it also must be dismissed. The third-party complaint seeks relief against the third-party defendant only if, and to the extent that the defendants City of Cleveland and Phillip A. Schwenz are held liable to the plaintiffs in the main action. An affirmative claim has been asserted by the thirty-party defendant against the plaintiffs and, in this action, the plaintiffs have made no claim directly

against the third party-defendant. Thus there is no conceivable need, purpose or requirement for the Court to retain jurisdiction over the third-party action after dismissal of the original action. See Moore's Federal Practice ¶ 14.26, at pp. 707 et seq.

Defendant Howard E. Dicken has asserted immunity from suit, in addition to lack of admiralty jurisdiction, as a ground for dismissal of the complaint as to him. The issue of immunity need not be decided in view of the Court's opinion on the jurisdictional issue.

IT IS ORDERED, therefore, that the complaint is dismissed for lack of jurisdiction over the subject matter.

IT IS FURTHER ORDERED that the third-party action is dismissed.

GIRARD E. KALBFLEISCH
United States District Judge

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